No. 11919

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

O'KEEFE AND MERRITT MANUFACTURING COMPANY AND L. G. MITCHELL, W. J. O'KEEFE, MARION JENKS, LEWIS M. BOYLE, ROBERT J. MERRITT, ROBERT J. MERRITT, JR., AND WILBUR G. DURANT, INDIVIDUALLY AND AS CO-PARTNERS, DOING BUSINESS AS PIONEER ELECTRIC COMPANY, RESPONDENTS

AND

UNITED STEELWORKERS OF AMERICA, STOVE DIVISION, LOCAL 1981, C. I. O., and PHILIP MURRAY, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STEELWORKERS OF AMERICA, C. I. O., INTERVENORS

ON PETITION FOR ENFORCEMENT WITH MODIFICATIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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93 Cong. Record, pp. 3535, 3704–3712, 3577–3578, 5095 — 28
93 Cong. Record, pp. 5290, 7503 — 29
93 Cong. Record, pp. 3577–3578 — 31
93 Cong. Record, p. 3533 — 32
93 Cong. Record, p. 3577 — 33
Foster, *From Bryan to Stalin* (International Publishers Co. 1937), pp. 153, 154, 162–163, 213–215, 272–273, 275, 276, 277, 298–299 — 38
Foster, *Toward Soviet America* (Coward-McCann, Inc., 1932), pp. 232–233, 258–259, 266 — 38
Gitlon, *I Confess* (E. P. Dutton & Co. Inc., 1940), pp. 334–395 — 38
Hale, Unconstitutional Conditions, 35 Col. L. Rev. 321, 357 — 23
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N. M. U. "Pilot," September 12, 1947, p. 2, cols. 3–4 — 35
N. M. U. "Pilot," October 24, 1947, p. 2, col. 2 — 36
O'Neal & Werner, American Communism (E. P. Dutton & Co. Inc., 1947), pp. 231–236, 245–246, 312–313 — 38
Public Utility Holding Co. Act, Sec. 11 (b) (1) — 41
Report of the Proceedings of the Fifty-Fifth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1935, p. 832 — 34
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The Retail, Wholesale, and Department Store Employee, February 1945, pp. 5, 14 — 37
Social Security Act (42 U. S. C. 409) — 23

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UNITED STEELWORKERS OF AMERICA, STOVE DIVISION, LOCAL 1981, C. I. O., AND PHILIP MURRAY, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STEELWORKERS OF AMERICA, C. I. O., INTERVENORS

ON PETITION FOR ENFORCEMENT WITH MODIFICATIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This reply brief is submitted in support of the constitutionality of Section 9 (h) of the National Labor Relations Act, as amended, which is challenged by the intervenors, United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, individually and as president of the United Steelworkers of America, herein called the Union. The procedural posture in which the question arises is set forth in our main brief at pages 3 and 33–34. The interpretation of Section 9 (h), as distinguished from its constitutionality, is set forth

in our main brief at pages 92–106, and is presently undisputed by either the Union or the employer.

Section 9 (h) of the Act, as amended provides as follows:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (c) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

STATUS OF COURT DECISIONS INVOLVING CONSTITUTIONALITY OF SECTION 9 (H)

The Court would probably wish to be advised of the present status of Court decisions on the issue of the constitutionality of Section 9 (h). To date there has been a total of five Court rulings on the issue, four by statutory three-judge courts pursuant to 28 U. S. C. A. 380 (a) (Judicial Code) [1] and one by a United States Court of Appeals in a proceeding under Sec-

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[1] *National Maritime Union* v. *Herzog*, 78 F. Supp., 146 (D. D. C.), affirmed as to 9 (f) and (g) thereby, according to the Supreme Court, making it unnecessary for it to rule on the constitutionality of 9 (h), 334 U. S. 854; *Wholesale Workers Union* v. *Douds*, and *American Communications Ass'n* v. *Douds*, 79 F. Supp. both decided by S. D. N. Y. June 28, 1948, probable jurisdiction noted by Supreme Court in *American Communications Ass'n* v. *Douds* November 8, 1948; *Osman* v. *Douds*, S. D. N. Y., decided September 20, 1948; appeal filed in Supreme Court.

tion 10 (f) of the Act to review a Board order.[2] All of the three-judge court cases cited in footnote 1 above, were rendered in actions brought by unions which had not complied with Section 9 (h) to enjoin the holding of a Board election to determine the employees' choice of a bargaining agent without the noncomplying plaintiff union on the ballot. The Court of Appeals case, *supra,* involved a proceeding such as here, in which the charging union (the same union, in fact as the intervenor in the instant proceeding before this Court) contested a provision in which the Board imposed as a condition to an order directing an employer to bargain collectively with the charging union the requirement that the union, within 30 days, comply with the filing provisions of Section 9 (h).

In all of these cases, the attack upon the constitutionality of Section 9 (h) was unsuccessful. In *National Maritime Union* v. *Herzog, supra,* the first of the three-judge court cases, the plaintiff attacked the constitutionality of Section 9 (h) and also of Sections 9 (f) and (g). Sections 9 (f) and (g), like Section 9 (h), prescribe upon unions certain filing requirements as a condition to access to Board facilities. The data required to be filed by Sections 9 (f) and (g) consist of information relating to the union's finances and organizational structure. In a decision rendered April 13, 1948, the three-judge statutory Court of the District of Columbia unanimously upheld the constitutionality of Sections 9 (f) and (g) and, with Judge Prettyman dissenting, also upheld the constitutionality of Section 9 (h). 78 F. Supp. 146. On appeal, the Supreme Court affirmed the lower court's ruling as to the constitutionality of Sections 9 (f) and (g), thereby making it unnecessary, in its opinion, to pass on the constitutionality of Section 9 (h). 334 U. S. 854.

All of the other three-judge court cases cited in footnote 1, *supra,* were decided by the same three-judge court in the Southern District in New York. In each instance, the Court, with District Judge Rifkind dissenting, upheld the constitutionality of Section 9 (h) on the identical ground as the majority of the court in the *National Maritime Union* case. 79 F. Supp. 563.

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[2] *Inland Steel Co.* v. *N. L. R. B.* and *United Steel Workers of America* v. *N. L. R. B.*, 170 F. 2d 258 (C. A. 7), decided September 23, 1948.

In the *Inland Steel* case, *supra,* the Seventh Circuit, with Judge Major dissenting, upheld the constitutionality of Section 9 (h) as imposing a valid condition to receipt by the union of the benefits of the Act.

Two of the three-judge court cases above cited, *American Communications Association* v. *Douds* and *Osman* v. *Douds,* are pending on direct appeals to the Supreme Court under Section 380 (a) of 28 U. S. C. A. (Judicial Code). The United Steelworkers of America, the Union involved in the *Inland Steel* case,[3] filed a petition for certiorari with the Supreme Court to review the ruling of the Seventh Circuit on Section 9 (h).

The Supreme Court, on November 8, 1948, noted probable jurisdiction in the *American Communications Association* v. *Douds.* The briefs of the parties have been filed in that case, and the case is due to be argued on or about February 28, 1949. The Supreme Court, on January 17, 1949, granted the petition for certiorari filed by the United Steelworkers of America (C. I. O.) to review the decision of the Seventh Circuit in the *Inland Steel* case.[4]

SUMMARY OF ARGUMENT

Congress acted within its constitutional powers in adopting and authorizing the Board to apply the policy of refusing to order employers to bargain with labor organizations whose officers do not file the affidavits contemplated by Section 9 (h) of the Act, as amended.

A. The withholding from a labor organization of the benefits of an order requiring an employer to bargain collectively with the organization does not impinge upon the constitutional right to self-organization.

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[3] Actually, the *Inland Steel* case was a consolidation of two proceedings, one brought by the company to review a Board order directing it to bargain with United Steelworkers in regard to pension plans and the other brought United Steelworkers to set aside the condition of the order requiring the union to comply with Section 9 (h). We refer to the case hereinafter as the *Inland Steel* case, since thereby it is distinguished from other proceedings, still pending, in which the United Steelworkers is seeking the same relief as it did in the *Inland* case (e. g., this case, also *W. W. Cross, Inc.* v. *N. L. R. B.* (C. A. 1), argued December 7, 1948, and awaiting decision.

[4] The *Inland Steel Company* has itself filed a petition for certiorari to review the merits of the Board's bargaining order in that case. The petition is still pending.

B. The condition imposed upon the Board's order, and the congressional policy embodied in Section 9 (h) which it effectuates, do not invade rights to freedom of speech or freedom of the press, or deny freedom of political belief, activity, or affiliation.

C. Congress could reasonably believe that the policies of the Act, and the security interests of the Nation, would not be fostered by extension of the benefits of the Act to labor organizations whose officers are Communists or supporters of organizations dominated by Communists.

D. The means adopted by Congress to assure that the benefits and facilities of the Act shall not be extended to labor organizations whose officers are Communists or supporters of organizations dominated by Communists or to persons who believe in or support organizations which advocate violent overthrow of the government are appropriate.

E. The condition contained in the Board's order is not unconstitutional because the facts required to be stated in the affidavit are allegedly "vague" and "indefinite."

F. Section 9 (h) of the Act is not a bill of attainder.

G. The condition contained in the Board's order does not encroach upon freedom of thought or freedom of political affiliation.

H. The wisdom of the legislation is not a matter for judicial review.

ARGUMENT

Congress acted within its constitutional powers in adopting and authorizing the Board to apply the policy of refusing to order employers to bargain with labor organizations whose officers do not file the affidavits contemplated by Section 9 (h) of the Act, as amended

A. The withholding from a labor organization of the benefits of an order requiring an employer to bargain collectively with the organization does not impinge upon the constitutional right to self-organization

The Union in its brief (pp. 50–68) contends that the withholding of the benefits which would accrue to it from enforcement of the Board's order, in and of itself, apart from the reasons for such withholding, denies to the Union its "funda-

mental rights to engage in organizing since the purpose of organizing is collective bargaining" (Br., p. 53). The Union further asserts that the refusal of government to require the Company to bargain collectively with the Union is unconstitutional because such refusal "would confine petitioning labor organization to the exercise of its economic strength in protection against employer attempts to destroy it" (Br., p. 54). This contention amounts to saying that the undisputed constitutional right of employees to associate in labor organizations comprehends a right to compel Congress to require employers to recognize and bargain collectively with labor organizations. The effect of this theory is to equate the protections of the National Labor Relations Act, which is the creature of Congress, with rights existing under the Constitution. The theory is patently unsound.

The Constitution protects the right of employees to form labor organizations and to bargain collectively, as it protects other civil rights,[5] only against infringement by government. Prior to 1935 employers were free to discharge employees as reprisal for joining labor organizations and to refuse to bargain collectively with labor organizations which represented their employees, as well as to create and to dominate labor organizations composed of employees for the purpose of frustrating the organization of truly independent unions among them. It can hardly be claimed that by failing to restrain employers from engaging in such practices Congress was evading any obligation under the Constitution.

As the Seventh Circuit stated in upholding the validity of Section 9 (h) in the *Inland Steel* case,[6] Congress, in enacting the National Labor Relations Act, "imposed new obligations

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[5] Compare *Shelley* v. *Kraemer*, 334 U. S. 1, holding that judicial enforcement of racial restrictive covenants violates the Fourteenth Amendment although the making and voluntary performance of such covenants does not. The Court pointed out, 334 U. S. at 13, that the Fourteenth Amendment, like other provisions of the Constitution, "erects no shield against merely private conduct, however discriminatory or wrongful." Compare, *Hurd* v. *Hodge*, 334 U. S. 24, 28–29, dealing with analogous obligations of the Federal government under the Fifth Amendment, in which the Court again reiterated the absence of obligation upon governments under the Constitution to illegalize or restrain private invasions of civil rights.

[6] See *supra*, p. 3.

upon employers and provided administrative machinery for the enforcement of those obligations, but it did not impose these duties because it was under constitutional obligation to employees or labor organizations to do so. On the contrary the statute was enacted solely because Congress deemed the imposition of these duties desirable as a means of protecting the public interest in the free flow of commerce" (170 F. 2d at 265). The entire scheme of the statute emphasizes the point. In the Act Congress created rights correlative to the obligations which it imposed upon employers. It did not however vest these rights in employees or in labor organizations, the rights accrued to society itself, for they were not private but "public rights"; power to enforce them was vested exclusively in the National Labor Relations Board; enforcement was to be solely in the public interest, and was to serve to effectuate only the public policy which, by enacting the statute, Congress sought to promote. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265; *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362–363; *Phelps-Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 192–193, 194, 200; *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, 47; *Jacobson* v. *N. L. R. B.*, 120 F. 2d 96, 99–100 (C. C. A. 3); cf. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25. "Any benefit which employees or labor organizations might derive from enforcement of these public rights was entirely incidental to public purposes which enforcement was designed to achieve." *Inland Steel* case, *supra*, 170 F. 2d at p. 266. Indeed, the benefit which accrued to a labor organization from enforcement of a Board order against an employer who had violated the Act, was held by the Supreme Court in *N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18–19, to be a factor which might properly militate against the issuance of a complaint by the Board, or enforcement of a Board order. In that case, the Court made it plain that if the issuance of a Board complaint or order would redound to the benefit of a labor organization which engaged in conduct deemed detrimental to public policy, or which might utilize that benefit for purposes alien to the objectives of the Act, the Board could properly refuse to proceed.

We submit that the fact that the National Labor Relations

Act has been in effect for more than 12 years and that its protections have proved of great value to employees and labor organizations has not given them a constitutional right to its perpetuation.

In support of this position, however, the Union in its brief (pp. 58, 61, 64–65), cites the dissenting opinion of Judge Prettyman in *N. M. U.* v. *Herzog,* 78 F. Supp. 146, 179, affirmed, 334 U. S. 854.[7] Judge Prettyman as the Union claims, did predicate his opinion that Section 9 (h) is unconstitutional upon the view that the withdrawal from labor organizations of the benefits which accrue to them as a consequence of Board orders and of utilizing Board facilities is, in and of itself, an invasion of the constitutional right of employees and labor organizations to self-organization. In answer to the Board's contention in that case, that Congress could properly withhold the benefits of the Act from labor organizations whose officers failed to file the affidavits contemplated by Section 9 (h), Judge Prettyman stated: "If the effect of the denial of the benefit were not an infringement of a constitutional right, I might agree with the government's view" (p. 182). But, as we demonstrate more fully below (pp. 9–10, *infra*), the affirmation by the Supreme Court of the unanimous holding of the court in the *N. M. U.* case, *supra,* sustaining the constitutionality of Section 9 (f) and (g) of the Act establishes conclusively that the denial of the benefits of the Act does not infringe any constitutional rights. This is so because the consequences which flow from failure to comply with Section 9 (f) and (g) are the same as those which flow from failure to comply with Section 9 (h), and if such consequences were an invasion of a constitutional right, then more would have been required to sustain the validity of Section 9 (f) and (g) than that these requirements have a reasonable relation to the purposes of the statute, yet the existence of such reasonable relation is all that the Board relied on in urging and the court relied on in upholding the validity of 9 (f) and (g), *N. M. U.* case, *supra,* pp. 160–161.

In the *N. M. U.* case the union contended that denial to it of a place on the ballot in a Board conducted election, because it had not complied with Section 9 (f) and (g), constituted an

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[7] See *supra,* p. 3.

invasion of its constitutional right to self-organization. In that case the union claimed, as the petitioning Union claims here (pp. 50–68), that access to the administrative machinery and benefits of the Act is so essential to the effective functioning of labor unions that to deny such access to some unions while permitting access to others results inevitably in destruction of the excluded organizations and thereby denies their right to organize for purposes of collective bargaining. It was argued there (p. 158), as here (Br. pp. 68–70), that because of the "results that flow" access could be denied to certain labor organizations only if some "clear and present danger" required this, and that access could not be made conditional upon filing and reporting requirements which were supported merely as reasonable requirements, incidental to valid legislation under the Commerce Clause.[8] The statutory three-judge court composed of Circuit Judges Miller and Prettyman and Chief Justice Laws of the United States District Court for the District of Columbia rejected this contention (p. 146). The court held (pp. 146, 159) that since the requirements of Section 9 (f) and (g) with respect to filing and reporting are "incidental to the power, which Congress was exercising, of granting an extraordinary privilege" (the privilege of acting as exclusive

[8] The Union in that case, as the Union does here (pp. 51–55), asserted that the provisions of Section 8 (b) (4) (B), 8 (b) (4) (C), and 303 (b) of the Act, as amended, insofar as they illegalize certain strikes and secondary boycotts and subject labor organizations which engage in such conduct to suits for damages and injunctions, operate as sanctions to insure compliance with the requirements of Sections 9 (f), (g), and (h). The Board pointed out, however, in its brief, that these sections cannot possibly be said to operate as sanctions against non-compliance with the requirements of Sections 9 (f), (g), and (h), since Section 8 (b) (4) (C) affects alike complying and non-complying labor organizations when they seek to represent employees who have selected another bargaining agent which the Board has certified, and Section 8 (b) (4) (B) affects non-complying unions no differently from complying unions which fail to obtain a certification. Clearly, any challenge to these provisions, in any event, can be made at the earliest when attempt is made to apply them to the activities of a particular labor organization. *Watson* v. *Buck*, 313 U. S. 387; *Alabama State Federation of Labor* v. *McAdory*, *supra*. Presumably for these reasons, which are equally applicable in this case, the statutory court in the *N. M. U.* case did not even mention this contention of the union in its opinion. The union pressed the point in its appeal to the Supreme Court, however, and the Supreme Court's *per curiam* affirmance of the judgment below must be taken therefore as a holding that the contention is without merit.

bargaining representative under the statute), Congress could lawfully demand that unions which desired to avail themselves of the privilege first comply with the filing and reporting requirements. The Court concluded that the consequences upon self-organizational activity of wilful non-compliance by a union with conditions which Congress was entitled to impose could not be attributed to Congress or to the Board, but solely to the union itself, and that denial of the benefits of the Act to labor organizations which refused to comply could therefore not be said to deprive those labor organizations of their constitutional right to freedom of association (pp. 160–161).

In affirming the judgment of the statutory court and rejecting the position taken by the union on appeal, the Supreme Court necessarily held (334 U. S. 854–855), that denial of access to the machinery and benefits of the Act to labor organizations which do not comply with conditions precedent erected by Congress does not invade the constitutional right of those labor organizations or of their members to freedom of self-organization. In addition, the Supreme Court necessarily held, as did the court below, that since no civil right was denied by the withholding of the benefits of the Act, the validity of conditions imposed by Congress upon receipt of those benefits is to be tested not by the standard of the "clear and present danger" rule, but by whether the condition is incidental and reasonably related to the objectives for which the facilities of the Act were designated.[9] We discuss this point *infra*, pp. 13–16.

Finally, insofar as the Union's claim that the right of union members to select their own officers is invaded (Br., pp. 62–64) rests upon the contention that their freedom is destroyed by the withholding of the benefit of the Board's order, the claim is likewise devoid of substance in the light of the Supreme Court's decision in the *N. M. U.* case, *supra*. Thus, if Section 9 (f) had imposed the obligation to file financial reports on

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[9] Since the Supreme Court's decision in the *N. M. U.* case, a three-judge court in *American Communications Association* v. *Schauffler*, 22 L. R. R. M. 2261 (D. C., E. D. Pa.), decided June 21, 1948, upheld the validity of Section 9 (f) and ((g) on the authority of the Supreme Court's decision in the *N. M. U.* case. The status of the cases dealing with the constitutionality of Section 9 (h) is set forth at pp. 2–4, *supra*.

one or more officers of the union, rather than upon the union as such, it could hardly have been contended that the Section was an unconstitutional interference with the right of unions to select their own officers merely because to secure the benefits of the statute union members might require their officers to file such returns or oust those officers who refused to do so. The Union, in its brief, apparently recognizes this, for it asserts, in connection with this argument (p. 63), that "Congress is forbidden by our Constitution to intrude into the area of political belief and opinion either for the purpose of barring individuals from holding office or coercing others to bar them." But if the substantive requirements of Section 9 (h) may be said to be invalid, as the Union claims, because they unconstitutionally "intrude into the area of political belief and opinion," they would be invalid regardless of their effect upon the voluntary action of union members in selecting officers. If, on the other hand, Congress is entitled to demand compliance with those requirements as a condition to the receipt by a union of the benefits of a Board order, the legislation is not rendered invalid because the importance of those benefits may induce union members to elect officers who choose to comply with the requirements of the law rather than those who do not.[10] See pp. 21–24 *infra*.

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[10] In his dissenting opinion in the *Inland Steel* case, *supra*, Judge Major took the position (p. 255) that because the affidavits contemplated by the Section are to be made by union officers, whereas the denial of benefits affects the union as such, the statute is arbitrary and unreasonable. But this argument overlooks the fact that a union can act only through its officers, and that Section 9 (f), while it speaks in terms of filing by the union, contemplates that such filing will be done by the responsible officers of unions, precisely as does 9 (h). If the responsible officer or officers failed or refused to comply with the filing requirements of Section 9 (f) for whatever reason, the union's membership would be placed in precisely the same position as they would if the union's officers failed to file the 9 (h) affidavits. The suggestion that the union members desiring to obtain the benefits of the Act would be unable to do so because they could neither compel their officers to file the documents nor oust those who refused to do so is one which even the petitioner does not make, presumably because, among other things, recent history demonstrates that such a contention would be wholly without substance. The argument that Congress is wholly without power to distinguish between bargaining representatives or types of union leadership with respect to bestowing the benefits of the Act, because such distinction tends to influence employees to choose eligible rather than

sion for permissible exercise of these rights, or which granted facilities for the dissemination of certain views, or for the gathering of certain associations, which were denied to others, or which punished individuals for having published their views or having joined an association.

In *Thomas* v. *Collins, supra,* for example, the Supreme Court held unconstitutional a state statute which imposed a prior restraint (requirement of registration) upon the right to solicit membership in a labor organization.[11]

There speech itself was restrained by the statute; criminal punishment was imposed on the act of speaking if the speaker had not previously registered. In the *Abrams, Herndon, Stromberg, Winters,* and *Thornhill* cases, *supra,* the statutes involved made the acts of speaking or of distributing literature, or of displaying symbols a crime. In the *Lovell, Cantwell,* and *Hague* cases, *supra,* the statutes involved imposed licensing requirements as conditions upon speech or assembly, and made speech or assembly without prior license a crime. In the *DeJonge* and *Whitney* cases, *supra,* the statutes involved made the act of joining a lawful organization, or attending a lawful public meeting a crime. In *Saia* v. *New York,* 68 S. Ct. 1148, the statute imposed restraints upon the use of loud speakers, which the Court regarded as a protected instrumentality of speech, and made speech through loud speakers a crime. In the *Schneider* case, *supra,* the state restricted opportunity for distributing literature by prohibiting distribution on the streets.

It is to statutes such as these, which impose prior restraints upon speech, press or assembly, or which make speech, or the

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[11] It may be noted, in passing, that that case did not hold that the states were without power to impose even registration or licensing requirements upon the occupation of labor union officer, which carries with it the power to call or instigate political, as well as economic strikes. That occupation, like the practice of medicine and dentistry, and other fiduciary occupations, affects the interests of union members, and of the public, and is therefore subject to regulation to the extent necessary to protect legitimate public interests. "That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas Court said, hardly to be doubted." *Thomas* v. *Collins,* 323 U. S., at 432. And the Supreme Court pointed out in *Alabama State Federation of Labor* v. *McAdory,* 325 U. S., 450, 469, "labor organizations are subject to regulation." Accord: *N. M. U.* v. *Herzog, supra.*

distribution of literature, or attendance at a meeting, or membership in an association an offense, that the "clear and present" danger rule to which the Union refers (pp. 70–76), applies. Only statutes which restrict opportunities for the expression or dissemination of views and information, or prohibit the expression of particular views in order to protect some competing public interest (compare the statutes involved in the *Schneider, Winters,* and *Cantwell* cases, *supra*), "must be narrowly drawn to deal with the precise evil which the legislation seeks to curb;" only such statutes must define specifically the conduct which is prohibited so that individuals may be entirely free to engage in conduct which the Government may not properly forbid.

As the Seventh Circuit stressed in the *Inland Steel* case, 170 F. 2d at p. 264, the Board's order, however, like Section 9 (h) itself, does none of these things. It does not deny to Communists, or to supporters of "Communist Front" organizations, the right to speak and to publish freely their views and opinions. It does not deny to them the right to continue to remain members of the Communist Party, or to continue to support "Communist Front" organizations. It does not deny to any person the right to believe in violent overthrow of the Government or to support organizations which advocate such a program. None of these activities or beliefs is made subject to prior restraint by Section 9 (h) or by the Board's order; neither that Section, nor the Board's order, makes these activities or beliefs punishable either criminally or by the imposition of civil sanctions. "In such a situation," observed the Seventh Circuit, in the *Inland Steel* case, "the cases cited by the union are inapplicable and hence not controlling here" (p. 264). Only if Section 9 (h) had undertaken so to restrict the exercise of freedom of speech or of the press, or of the freedom to join political parties would the question have been presented whether such activities could properly be deemed by Congress to give rise to so grave and imminent a danger to government that their curtailment was necessary to self-preservation. Compare *Schenck* v. *United States,* 249 U. S. 47; *Frohwerk* v. *United States,* 249 U. S. 204; *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 414; *Lewis Publishing Co.* v. *Morgan,*

299 U. S. 288, 313; *Dunne* v. *United States,* 138 F. 2d 137 (C. C. A. 8), certiorari denied, 320 U. S. 790.

Since neither congressional policy nor the Board's order imposes any prior restraint upon belief or association the only question, as the majority noted in the *Inland Steel* case, is whether Congress may validly distinguish between labor organizations which may receive the benefits of Board orders and those which may not, on the basis of whether their officers are members of, or affiliated with the Communist Party, or believe in, or support organizations which believe in or teach, violent overthrow of the United States Government. This question is to be answered, as the authorities discussed below demonstrate, not by reference to the "clear and present danger rule," but rather by inquiry whether these factors are reasonably related to the attainment of the objectives which Congress properly sought to promote.

It has long been recognized that the Fifth Amendment, though lacking an equal protection clause, guards against legislation by the Federal Government which either imposes regulations upon, or grants benefits to certain groups and not others, where the basis for distinguishing between those subjected to the regulation, or entitled to receive the benefits, and those not regulated or benefited, is irrelevant to the legitimate purposes for which the regulation is imposed or the benefit granted. See *Hirabayashi* v. *United States,* 320 U. S. 81, 100. Because differences of "color, race, nativity, religious opinions, political affiliations" (*American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92), "are in most circumstances irrelevant" to the legitimate purposes for which benefits may be granted or regulation imposed, distinctions based upon such factors are, in most circumstances, "therefore prohibited" by the Fifth Amendment. *Hirabayashi* v. *United States,* 320 U. S. at p. 100; *Hurd* v *Hodge,* 68 S. Ct. 847. As Mr. Justice Black pointed out, speaking for the Court in *Kotch* v. *Pilot Commr's,* 330 U. S. 552, 556, "a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reasons having *no rational relation* to the regulated activities," could not be supported under the Constitution. [Italics added.]

However, as the Supreme Court has said "it by no means follows" that because the fact of race, like political belief or affiliation is "in most circumstances irrelevant" to legitimate legislative purposes, it is always irrelevant (*Hirabayashi* v. *United States, supra*). Alienage, too, is often irrelevant to the objects of specific legislation (*Takahashi* v. *Fish and Game Commission*, 68 S. Ct. 1138) but "it does not follow that alien race and allegiance may not have in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification." *Clark* v. *Deckebach*, 274 U. S. 392, 396. Where factors such as these are shown to be relevant to the attainment of legitimate legislative policies, their use as a basis for distinction "is not to be condemned merely because in other and in most circumstances [such] distinctions are irrelevant." *Hirabayashi* case, *supra*, 320 U. S. at p. 101.[12]

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[12] Even where legislative or administrative distinctions based on race or similar factors result in denying to a single group, not merely benefits which government is under no obligation to grant, but fundamental civil rights. such distinctions are not always unconstitutional. "Pressing public necessity may sometimes justify the existence of such restrictions, racial antagonism never can." *Korematsu* v. *United States*, 323 U. S. 214, 216. The *Korematsu* and *Hirabayashi* cases, *supra*, afford a striking illustration of the distinction between the types of governmental action to which the clear and present danger rule applies and those to which the "rational basis" test applies. In those cases curfew and exclusion restrictions were imposed upon persons of Japanese ancestry who lived on the West Coast. The Court considered two questions: (1) whether the possibility of sabotage was so grave and imminent a danger to national security as to justify denial to individuals generally, of their fundamental civil liberties to freedom of movement and freedom to choose their own place of residence, (2) whether Congress and the military authorities could reasonably believe that the evil to be feared was more likely to stem from citizens of Japanese ancestry, than from other classes of citizens. As to the first question, the Court applied the "clear and present danger rule." See, 320 U. S. at p. 99, and 323 U. S. at pp. 217–218. The second question was decided pursuant to the "reasonable relations" rule. On this point, in the *Hirabayashi* case, the Court noted that it could not say that with respect to the specific issue involved there was "no ground for differentiating citizens of Japanese ancestry from other groups in the United States." 320 U. S. at p. 101.

Applying the approach of these cases to the instant case it becomes apparent that only if Congress had prohibited Communists and believers in violent overthrow of government from holding office in labor unions, as it has not, and only if the Union further established that the right to hold office in labor unions, like the right to leave one's house after 8 p. m., is a fundamental civil right, and that government therefore could not impose reason-

Thus, where distinctions based on political activity, belief, or affiliation or upon race, religion, or alienage, are made in regulatory legislation the question presented is whether these factors are relevant to the particular valid objects of the regulation. Where such distinctions are made, as in the instant case, in connection with the grant of benefits the sole question presented is whether the factors used are incidental and reasonably related to the particular purposes for which the benefits are properly granted.

Examples of its application best illustrate the operation of the rule. In *United Public Workers* v. *Mitchell,* 330 U. S. 75, it was held that, in the exercise of its power to promote the efficiency of the public service, Congress could properly bar from public employment persons who exercised their constitutional right to engage in political activity.[13] In that case, the Court disposed of the contention that Congress could not condition the privilege of government employment upon surrender of constitutional rights, particularly where it could not be proved that the exercise of such rights had any bearing whatever upon the efficiency with which the employees involved performed their duties.[14] The Court pointed out that it was sufficient to sustain the legislation that Congress *"reasonably deemed"* political activity by government employees as interference "with the efficiency of the public service." 330 U. S., at 101. (Italics supplied.) In *Oklahoma* v. *Civil Service Commission,* 330 U. S. 127, 142–143, it was held that, in the exercise of its power to "fix the terms upon which its money allotments to states shall be disbursed," Congress could constitutionally deny allotments to states which refused to remove

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able limitations upon the classes of persons who may hold such office (but see note 11, *supra,* and pp. 23–24, *infra*) would the question be presented whether the presence of Communists and believers in violent overthrow of government in such positions give rise to a clear and imminent danger of political strikes? The answer to that question, of course, is in the affirmative.

[13] The Court, in passing, quoted Mr. Justice Holmes' classic epigram, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *New Bedford,* 155 Mass. 216, 220, 29 N. E. 517. (330 U. S., at 99, note 34.)

[14] Compare *Crane* v. *New York,* 239 U. S. 195, 198, and *Clarke* v. *Deckebach,* 274 U. S. 392, upholding the power of a state to bar aliens from public employment.

from their pay rolls employees who engaged in political activity. In that case the Court overruled objections based not only on the fact that exercise of constitutional rights was made the basis for denial of benefits but also on the fact that Congress thereby regulated local political activities of state officials, a field reserved exclusively to state control.

In *Friedman* v. *Schwellenbach*, 159 F. 2d 22, certiorari denied, 330 U. S. 838, the United States Court of Appeals for the District of Columbia upheld the use of the factors of adherence to the Communist Party line and active participation in organizations dominated by the Communist Party as the basis for denying to individuals the privilege of retaining governmental employment. Such activities and affiliations were deemed relevant to the loyalty with which individuals might perform their governmental duties.

In re Summers, 325 U. S. 561, held that a State may constitutionally deny membership in its bar to persons who, because of religious convictions, refused to take an oath to bear arms in time of war. *Hamilton* v. *Board of Regents*, 293 U. S. 245, held that a State may bar from its colleges persons who, for religious reasons, refused to attend classes in military training.

In *Turner* v. *Williams*, 194 U. S. 279, it was held that Congress could properly make the privilege of immigration turn upon the political beliefs of the immigrant. Although, as the Union points out in its brief (p. 66), the power of Congress over immigration may not be exercised in violation of the Bill of Rights, it was determined in that case that the action of Congress in excluding an immigrant purely because of his passive attachment to the principles of anarchy violated no constitutional inhibition. Belief in anarchy, the Court held, was not unrelated to the question which was within the power of Congress to determine, i. e., whether the immigrant would tend to be a desirable resident.[15]

[15] Accord: *Lopez* v. *Howe*, 259 Fed. 401 (C. C. A. 2) certiorari denied, 254 U. S. 613; *United States ex rel. Georgian* v. *Uhl*, 271 Fed. 67 (C. C. A. 2), certiorari denied, 256 U. S. 701; *Ex Parte Carminita*, 291 Fed. 913 (D. C. N. Y.); *United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707 (C. C. A. 2), certiorari denied, 287 U. S. 607; *Ahern* v. *Wallis*, 268 Fed. 413 (D. C. N. Y.).

While a state may not, under the Constitution, arbitrarily ban aliens from lawful occupations (*Truax* v. *Raich,* 239 U. S. 33; *Takahashi* case, *supra*), a state may guard against presumed evil propensities of certain aliens by prohibiting all aliens from operating pool halls (*Clarke* v. *Deckeback,* 274 U. S. 392, 396–397); engaging in the insurance business (*Pearl Assurance Co.* v. *Harrington,* 38 F. Supp. 411, affirmed, 313 U. S. 549); shooting wild game or carrying arms used for sporting purposes (*Patsone* v. *Pennsylvania,* 232 U. S. 138), and even from owning land (*Terrace* v. *Thompson,* 263 U. S. 197; *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263 U. S. 313.

Again, although race is seldom a valid basis for distinguishing as between groups to be subjected to certain regulations (*Takahashi* case, *supra*), we have seen in the Japanese exclusion cases, *supra,* pp. 17–18 n. 12 that where the race factor is relevant to the valid purpose of the legislation involved, the legislature or the government may validly utilize that factor in classifying the groups to be regulated.

Finally, even blood relationship and friendship have been held to be a valid basis for classification in those cases where their relevancy appears. Thus, in *Kotch* v. *Pilot Commissioners,* 330 U. S. 552, it was held that a state could constitutionally deny the right to practice the occupation of river pilot to all except friends and relatives of licensed pilots. Although such a basis for classification would, in most cases, be prohibited by the Constitution, the Supreme Court held that because it was not shown that this method of classification was totally unrelated to the legitimate governmental objective of securing a safe and efficient pilotage system, the legislation as administered was immune from attack.

In *Hawker* v. *New York,* 170 U. S. 189, one of the pioneer cases in establishing the "reasonable relation" test it was held that a state could constitutionally prevent persons who had previously been convicted of a felony from practicing medicine. Cf. *Dent* v. *West Virginia,* 129 U. S. 114.

One reading the brief of the Union would hardly be aware that these controlling decisions of the Supreme Court existed. Most of them are ignored altogether; and some are brushed

aside on a basis entirely unsupported by a reading of the cases. Instead, the Union, to establish its claim that Section 9 (h) invades civil liberties, relies exclusively upon the allegation that, because the benefits of the Act are available only to union officers who are not members or supporters of the Communist Party and who do not believe in violent overthrow of government, a consequence of Section 9 (h) will be to induce labor union officers to withdraw from or refrain from becoming affiliated with the Communist Party, and to renounce belief in violent overthrow of government (Br., pp. 21–25, 27–28, 30–32, 50, 63, 69, 70, 73–75). A further consequence, it asserts, will be to induce union members to oust from union office those who refuse to file the affidavits (Br., pp. 50, 60). The Union argues (Br., p. 50) that because Congress could not, absent "clear and present danger", constitutionally directly compel union officers to refrain from joining or to withdraw from the Communist Party, or to renounce belief in violent overthrow of the government, any legislation which may induce union officers to take such action is *ipso facto* unconstitutional.

But the validity of legislation enacted pursuant to powers conferred upon Congress by the Constitution is not to be tested by the possible consequences of such legislation upon the voluntary action of individuals. If the contrary were true, Congress would have been without power to enact the Social Security Act, in which Congress offered a rebate of ninety per cent of the unemployment compensation taxes collected within the state to those states which enacted particular types of unemployment compensation legislation. For clearly Congress was without power under the Constitution directly to compel the states to enact such legislation. Yet in *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585–598, it was held that since the imposition of taxes and the granting of rebates was an appropriate exercise of the power of Congress over taxation and expenditures, the legislation could not be condemned because it tended to accomplish results which Congress was without power under the Constitution to accomplish directly. Similarly in *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, it was held that the exercise of Congressional power to erect and oper-

ate electric power plants and to sell power so produced at rates fixed by Congress, was not to be condemned because the effect of such sales at rates which private power companies could not profitably meet was to drive such companies out of business. Clearly, however, Congress had no power under the Constitution directly to prohibit private companies from engaging in the electric power business. So too, in *Oklahoma* v. *Civil Service Commission,* 330 U. S. 127, it was held that Congress could constitutionally condition grants-in-aid to the states upon removal by the states from their pay rolls of persons who exercised their constitutional right to engage in political activity. Clearly, however, Congress had no power under the Constitution directly to prohibit persons employed by state governments from engaging in political activity. Moreover, Congress had no power under the Constitution to compel state governments so to restrict political activity of their employees.

In each of these cases the effect of the legislation or administrative action was to induce voluntary action which constitutional limitations precluded Congress from compelling directly. Yet in none of these cases was this fact held to detract from Congress' "authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *Oklahoma* v. *Civil Service Commission, supra,* at p. 143. That the adoption of particular means may have an effect upon activities which Congress may not constitutionally control, does not, as the Court specifically held in the *Oklahoma* case, make the use of such means invalid.

To the extent that the Union's argument on this phase of the case rests upon the allegation that the hypothetical action of union leaders in restricting their political activities and beliefs, and the hypothetical action of union leaders in ousting union officers who do not do so would not in fact be voluntary but would rather result from coercion flowing from the alleged need to secure the benefits offered by the statute, the argument is likewise answered by the cases cited above. In *Steward Machine Co.* v. *Davis, supra,* 301 U. S., at pp. 585–591, for example, the Supreme Court held that the ninety percent rebate offered to the states, though it constituted a powerful "inducement" and "temptation" to enact the desired

legislation, did not amount to "coercion" of the states in violation of the Tenth Amendment. To fail to draw the line between "temptation" and "coercion," said Mr. Justice Cardozo, speaking for the Court, "is to plunge the law into endless difficulties." 301 U. S., at pp. 590–591.[16]

Again, the Union argues in its brief (pp. 13, 17, 40–41, 57, 66–67, 68) that Section 9 (h) is unconstitutional because the motive for its adoption was to drive from office, in those labor organizations subject to the Act, union leaders who are members or supporters of the Communist Party, or who believe in violent overthrow of the government. But this argument, like the argument made in the *Steward* case which sought to condemn the Social Security Act because the motive for its adoption was to induce the states to enact unemployment compensation laws, "confuses motive with coercion." 301 U. S., at p. 591. When Congress, as in the Social Security Act, and in Section 9 (h), grants benefits upon condition the condition is not to be invalidated unless the conduct required for its fulfillment is unrelated to the legitimate purposes for which the benefit is granted, or to any other legitimate end. Where reasonable relation exists between the condition and the legitimate legislative end to be attained "inducement or persuasion does not go beyond the bounds of power." *Steward* case, *supra,* at p. 591. Of course, just as a tax imposed by Congress is not valid "if it is laid upon condition that a state may escape its operation through adoption of a statute *unrelated* in subject matter to activities fairly within the scope of national policy

[16] To the extent that *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Linder* v. *United States*, 268 U. S. 5, upon which the Union relies (p. 63), may be taken as suggesting a contrary rule these cases must be regarded as having been overruled by the Steward case, and the other cases discussed, *supra*, pp. 21–22. The Union also relies, as did Judge Major dissenting in the *Inland Steel* case, upon *Frost* v. *Railroad Commission*, 271 U. S. 583. In *Stephenson* v. *Binford*, 287 U. S. 251, 272, 275, the Supreme Court explained that the rule of the *Frost* case applied only where there was "no relation" between the condition and the privilege accorded, i. e., where the condition was an end in itself and not a "means to a legitimate end." Where, as here and in the *Stephenson* case, there is a reasonable relationship between the condition and the legitimate objects for which the benefits are given, the legislation is not to be invalidated even where compliance with the condition may involve voluntary surrender of a constitutional right. See Hale, *Unconstitutional Conditions*, 35 Col. L. Rev. 321, 357.

and power" (*Steward* case, *supra,* at p. 590, italics added), so the denial of benefits under the Act would not be valid if the conditions which labor organizations are required to meet to obtain those benefits were unrelated in subject matter to the activities which Congress legitimately sought to promote and encourage by enactment of the National Labor Relations Act.

The "clear and present" danger rule would be inapplicable even if Congress had, as it has not, prohibited all Communists and the like from holding office in labor unions. Because the occupation of labor union officer, like other fiduciary occupations, affects the public interest, Congress is clearly empowered to require that persons desiring to engage in the occupation meet qualifications reasonably deemed appropriate to safeguard the public interest. And the validity of the qualifications required is, of course, not to be determined under the "clear and present danger" rule, but rather by the presence or absence of a rational connection between the qualifications and the legitimate end in view. See cases cited, *supra,* pp. 18–20.

Moreover, even if the right to hold office in a labor union were, unlike the right to practice other occupations, deemed beyond the reach of legislative power save to avoid a "clear and present danger" of substantative evils, a regulation which prohibited Communists from holding office in labor unions would be adequately supported. For the evidence recited, *infra,* pp. 25–39, shows, as the Court held in the *N. M. U.* case, that Communist officers of unions do misuse their powers to call strikes in the interests of the Party. Such conduct is clearly within the power of Congress to proscribe. To avoid the clear danger that Communist officers will engage in such conduct, Congress could, under the classic statement of the clear and present danger test (*Schenck* v. *United States,* 249 U. S. 47, 52), exclude Communists from union office. The Court in the *N. M. U.* case held, after extended analysis, that Section 9 (h) does meet the "clear and present danger" test, if that test is applicable (79 F. Supp. 165–169) and the Court in the *American Communications* case (*supra,* pp. 2, n. 1, 3) adopted that opinion as its own.

The Board in the cases thus far decided believed that since the clear and present danger test is manifestly inapplicable, it

was unnecessary to argue that that test had been satisfied. However, it does not concede and never intended to concede that the test, properly understood (see text, *supra*, p. 24) could not be met, even though there seems to have been some misunderstanding of its position by the dissenting judge in the *American Communications* case (79 F. Supp. p. 562), and in the *Inland Steel* case (170 F. 2d 247).

The instant statute does not, however, prohibit Communists and the like from holding office in labor unions. We turn then to the precise questions which may here properly be presented. These are: (1) whether denial of the benefits of the Act to labor organizations whose officers are Communists or members of Communist-dominated organizations, or who believe in, or support organizations which advocate violent overthrow of the government, is reasonably related to the objectives which Congress legitimately sought to promote by enactment of the statute, and (2) whether the methods utilized to promote these objectives are appropriate means for their effectuation.

C. Congress could reasonably believe that the policies of the Act, and the security interests of the Nation would not be fostered by extension of the benefits of the Act to labor organizations whose officers are Communists or supporters of organizations dominated by Communists

In enacting the National Labor Relations Act, Congress sought to minimize strikes in industries affecting commerce by promoting the process of collective bargaining as a practice conducive to "friendly adjustment" of disputes over wages, hours and working conditions between employers and employees. In addition, Congress sought to promote self-organization among employees for the purpose of equalizing bargaining power between employees and employers, to the end that wage earners would receive a larger share of the products of industry and thereby enable the nation to avoid calamitous depressions. In that Act, Congress itself excluded one class of labor organizations, those supported or dominated by employers, from its benefits (Section 8 (2)), because Congress believed that the objectives which it sought to attain through the Act would not be fostered if employees were represented for

purposes of collective bargaining by such organizations. It also excluded certain groups of employees such as agricultural laborers and domestic servants (Section 2 (3)). As we have indicated above, moreover (pp. 6–7 *supra*), the Supreme Court in the *Indiana & Michigan* case, 318 U. S. 9, 18–19, held it to be incumbent upon the Board to withhold its processes, and hence the benefits of the Act, where those processes were invoked by labor organizations which sought to use those benefits for purposes alien to the policies of the Act. And, as the Seventh Circuit noted in the *Inland Steel* case, *supra* (pp. 265–266), "the benefits of the Act could not be extended to shield concerted activities which Congress had not intended to protect," citing *N. L. R. B.* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240; and *Southern Steamship Co.* v. *N. L. R. B.,* 316 U. S. 31. See also *N. L. R. B.* v. *Sands Mfg. Co.,* 306 U. S. 332.

In amending the Act, Congress determined that the extension of the benefits of the Act to certain other types of employees or labor organizations likewise would not tend to effectuate the statutory policies or might endanger other important national interests. Thus, to guard against the dangers of divided allegiance, Congress denied the benefits of the statute to labor organizations composed of supervisors (Sections 2 (3), 2 (11), 14 (a), and to labor organizations composed of rank and file workers when they seek to represent plant guards (Section 9 (b) 3). To "protect the rights of individual employees in their relations with labor organizations whose activities affect commerce" (Section 1 (b)), Congress in Sections 9 (f) and (g) provided for denial of the benefits of the Act to labor organizations which failed to file and disclose to union members specified financial and structural reports and information. This requirement, that labor organizations which desire to use the benefits of the Act file and make available to union members information relevant to the functioning of such organizations and to the obligations and privileges of membership, being intimately related to the intelligent exercise by union members of the right to select bargaining representatives, the protection of which was an object of the legislation, is of established validity. *N. M. U.* v. *Herzog, supra.* The provisions of Section 9 (h) are part of this pattern of restrictions imposed by

Congress upon the benefits of the Act for the purpose of guarding against misuse of those benefits and frustration of the legitimate objectives of the statute.

In Section 1 of the National Labor Relations Act, as amended, Congress incorporated the following finding:

> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

As we shall demonstrate below, Section 9 (h) was the product of the determination by Congress that certain practices of some labor organizations whose officers were members of or supporters of the Communist party, or who believed in or supported organizations which advocated violent overthrow of the Government were inimical to the purposes for which the protection of the statute was granted. Congress determined that extension of the benefits of the Act to such labor organizations would not serve to promote the policies of the Act, and might endanger national security interests. As we shall further demonstrate below, Congress believed that Communists and their supporters do not view labor unions primarily as instrumentalities for the improvement of the economic position of employees vis-a-vis their employers, but rather as weapons in a struggle to achieve political ends. Congress further believed that Communists and their supporters, and persons who advocate violent overthrow of the government, when they attain positions of power and leadership in a labor union, would be likely not to practice collective bargaining as a method of "friendly adjustment" of employer-employee disputes, but, instead as a vehicle for promoting strife between employers and employees. Congress also believed that Communists and their supporters, and persons who advocate violent overthrow of the government, if in control of labor organizations, would be prone

to provoke strikes disruptive of interstate commerce, not for the purpose of improving the economic lot of union members, but for political purposes. And finally, Congress believed that officers of labor organizations who are Communists, or supporters of communism, would be likely, in periods of national emergency, to utilize their power within such organizations to call and promote strikes contrary to the interests of our government, if those interests happened to be opposed to the interests of a foreign power, Soviet Russia.

In its report recommending enactment of a predecessor provision to Section 9 (h) the House Committee on Education and Labor stated (H. Rep. No. 245, 80th Cong., 1st Sess., p. 39): "Communists use their influence in unions not to benefit workers but to promote dissension and turmoil." Congressman Hartley, manager of the bill in the House, urged that the benefits of the Act should be limited to labor organizations whose leaders were "devoted to honest trade unionism and not class warfare and turmoil" (93 Cong. Rec. 3535).[17] Numerous Congressmen, during the course of debate, indicated their belief that in periods of national emergency Communist leaders of trade unions might promote strikes for the purpose of undermining the ability of the government to effectuate its policies (93 Cong. Rec. 3704–3712). Representative Kersten pointed out (93 Cong. Rec. 3577–3578): "We know that it is the purpose of the Communist Party to use the labor union as a tool to bring about the spread of their anti-human doctrine."

In the Senate, Senator McClellan, sponsor of Section 9 (h), stated (93 Cong. Rec. 5095):

> * * * a small minority of Communists are able to infiltrate into these organizations, and by the processes under which they operate they are able to rise, and they have risen, in some unions to official positions. * * * If they rise to positions of power as officers in labor organizations, then, with the law that we enact, investing certain powers in labor organiza-

[17] References to the Congressional Record throughout are to the unbound daily edition.

> tions, such as the power of collective bargaining, and other powers and rights that we have legislated and invested in them, we are simply placing the power and authority and the sanction of law behind men who are in those positions, giving them authority to bargain collectively to deal with management of industry and thus wield a greater influence in the economic and political life of the Nation. We are simply giving authority to people who are not loyal to our Government, who will use that power as Communists have demonstrated in the past they will use it, for the purpose of subversive work and for undermining the very fundamentals upon which this Government rests.

The opponents of the measure attacked it not because its objective was improper, but because they did not believe that the means selected for coping with the danger were wise. For example, Senator Morse stated (93 Cong. Rec. 5290): "I need not reiterate my opposition to Communists and their beliefs. I shall fight Communism with all my energy because it destroys the liberties of freemen. I want to say that Communism must be stamped out of the free labor movement of this country, if we are to preserve the rights of free workers and protect the dignity of the individual." President Truman, in his veto message, stated (93 Cong. Rec. 7503): "Congress intended to assist labor organizations to rid themselves of Communist officers. With this objective I am in full accord."

The conclusions of Congress, that Communist leaders of labor organizations might utilize the powers derived from protection accorded by the Act to foster policies other than the collective bargaining favored by Congress derived from the personal experience and observation of the legislators and from testimony before the House and Senate Committees which considered the bill, and they comported with the conclusions reached by other Committees of Congress, and with the judgment of many trade-union leaders and numerous experts in the field of industrial relations. Much of that supporting evidence which, we here set forth, is spelled out in the majority opinion in the *N. M. U.* case, *supra,* at pp. 168–171; 175–176.

In 1941, the House Committee on Un-American Activities stated in its report (H. Rep. No. 1, 77th Cong., 1st Sess., pp. 9–10): [18]

> The evidence which the committee has gathered bears abundant testimony to the fact that throughout the years there has been a major purpose of the Communist Party to attempt to bore from within the ranks of American labor in an effort either to turn labor organizations into its political tools or to disrupt and destroy them. * * *
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> It is of basic importance to understand the exactly opposite purposes of the American labor movement on the one hand and the Communist Party on the other. The aims of the American labor movement are to improve the conditions of the American workers and over a period of time to secure for them a better and fuller life and a place of partnership in the industrial life of the United States. The purposes of the Communists on the other hand are in the words of Stalin to make the unions a school of communism, to increase in every possible way the antagonism between wage earners and other sections of the population and to prostitute the labor movement for the use of the party in carrying out various of its international plans even if in so doing the welfare of the particular group of workers in question may suffer as a consequence. Hence, wherever Communists have gained a foothold in the labor movement they have sought by every means at their command to remove from office any labor leader however devoted to the welfare of the rank and file workers he might be who has refused to cooperate with the party line.
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> We find that the program of the Communist Party calls for determined opposition to the national-defense program and for a concentration of efforts in basic and war industries. The committee's records show that

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[18] See, also, H. Rep. No. 2, 76th Cong., 1st Sess., pp., 46–64 (1939), describing Communist penetration of labor unions.

> from the Communist standpoint the main purpose of a strike is political and in order to further in some way or another the program of Moscow. Clearly, this could be served by the bringing about and prolonging of strikes in defense industries. Thus we see again how diametrically opposite are the aims and purposes of the American labor movement on the one hand and the Communist Party on the other.

The House Committee which considered Section 9 (h) heard Mr. Louis Budenz, onetime managing editor of the official Communist newspaper, The Daily Worker, and former member of the National Committee of the Communist Party, testify that, to his knowledge, a strike which occurred in 1941 at the Milwaukee plant of the Allis-Chalmers Company, had been deliberately precipitated and provoked by the Communist officers of the local union at that plant as a result of instructions delivered to those officers by the Political Committee of the Communist Party; and that the purpose of the strike was not to improve the economic position of the union but to impede the American program of giving aid to Britain, and thereby to assist the effectuation of the foreign policy of the Soviet Union.[19] Mr. Budenz further testified that Communist leadership during this period, had, for the same reason, precipitated a strike at the North American Aviation Company.[20] The effect of the strike at the Allis-Chalmers plant on the defense program was related to the House Committee by Mr. Storey, Vice President of the Company. He testified that the strike, lasting 76 days, held up for that period delivery of power units (turbo-generators) "to a plant that the Government wanted to build to make powder during wartime."

On the floor of the House, Congressman Kersten summarized Mr. Budenz' testimony concerning the Allis-Chalmers strike, as an example of the dangers of vesting additional power in the hands of labor leaders who are Communists or supporters of the party. He said (93 Cong. Rec. 3577–3578):

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[19] Hearings before the House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 3603–3623. See also, pp. 1380–1487, 1973–2142. Compare Hearings before the Senate Committee on Labor and Public Warfare, 80th Cong., 1st Sess., pp. 819–873.

[20] House Hearings, op. cit. note, pp. 1384–1385.

> One example of Comunist tactics that came to the attention of our Committee * * * is the example testified to by Mr. Lous Budenz, former editor of the Communist Daily Worker. Budenz testified that the Communist Party Political Committee in New York decided in the year 1940 that a strike should be called in the Allis-Chalmers Co., of Milwaukee, because they were one of the few firms making steel turbines for United States destroyers and that by pulling the strike in that plant they could bring about a following of the party line at that time of opposing aid to Britain. That was before Hitler attacked Russia. Budenz testified as to traveling to Milwaukee and meeting in secret with Mr. Eugene Dennis, present secretary of the Communist Party, and with Mr. Harold Christoffel, the Communist Party member and president of the Allis-Chalmers local, at which secret meeting it was decided to strike the plant pursuant to the decision in New York of the Communist Party. * * * It was later determined by the Milwaukee courts that over 2,000 of the strike ballots were fraudently stuffed into the boxes. That the Communist Party, as agents of a foreign government, should be able to cause a strike in an American plant is horrifying. * * *

Congressman Hartley stated to the House (93 Cong. Rec. 3533), that "If anyone doubts the need of [Section 9 (h)] all you have to do is to read the testimony taken by our subcommittee in connection with the Allis-Chalmers strike in Milwaukee and you will understand that section of the bill is most in order."

Congress was not unaware that Communist officers of labor organizations sometimes effectively represent the economic interests of members in collective bargaining, and in grievance adjustment, especially during fortuitous periods of nonconflict between the party line and American policy and that to this extent their activities during these happy intervals do tend to effectuate the policies of the Act. But Congress believed that whatever public value Communist leadership of labor unions might have in this respect was clearly outweighed by the danger

that they might, on other occasions, utilize their power and influence for purposes inimical to the policies of the Act and to national security. Mr. Story testified that (House Hearings, *supra*, pp. 1392–1393):

> The Communists cleverly intertwine grievances, we will say real grievances, imagined grievances, and then they make up grievances to cause unrest, so that they appear to be carrying on good trade-union practice at times. They delude the workers and * * * that is one of the reasons that our workers do not appreciate the menace of communism, because they seem to be working for the benefit of the workers in a trade-union area.

Congressman Kersten stated to the House (93 Cong. Rec. 3577):

> * * * in times past, Communists and their fellow travelers made a specialty of studying trade-unionism and the technique of the union hall. They became experts in the knowledge of trade-union matters so much so that many good American workers have been willing to place their fate in the hands of party-line officers only to find that they became the dupes of Communists tactics. * * *

The experiences of prominent leaders of national labor organizations confirm the opinion of Congress that diversity exists between the economic goals of trade-union activity which Congress seeks to foster and protect in the Act, and the political objectives toward which Communist leaders of trade-unions seek to orient their organizations.

In 1934, the Fifty-Fourth Annual Convention of the American Federation of Labor adopted a resolution relating to Communist infiltration into labor unions which read, in part, as follows:

> Members of the Communist Party have endeavored to bore within the trade-union movement and establish so-called cells within local unions for the purpose of destroying the trade-union movement by making it a part of the Communist political party so that the pur-

> poses and the method of applying the objectives of the Communist party could be put into operation in the industrial field.[21]

In its Fifty-Fifth Convention, the Executive Council of the Federation adopted a report declaring that Communists "are not acting in the unions as trade-unionists, but rather as Communists. Instead of being loyal to their unions, they are loyal to their party." [22]

In its Fifty-Ninth Convention, in 1939, the Federation adopted a resolution recommending that Communists be excluded from membership in unions affiliated with the American Federation of Labor. The resolution declared in part: [23]

> It is the openly avowed and clearly stated purpose of the Communist Party to obtain control of labor unions in order, first to use them as recruiting grounds for more members and followers; secondly, to use them in order to spread inflammatory propaganda and so influence the great mass of workers; and thirdly, to use them to create strikes and make impractical demands in order to disrupt industry and then seize it for the social revolution;
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> * * * * *
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> Communist agitators, working under definite instructions from the organized Communist Party, are constantly endeavoring to "bore from within" in every union, to the end that they may obtain positions of influence and control and so lead the workers along the road to Communism; and
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> In every instance where Communist-led groups have obtained any measure of such control in labor unions

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[21] Committee Report, Resolution No. 201—by Delegate Paul Porter, Radio Factory Workers' Union, Federal Labor Union No. 18609, in Report of the Proceedings of the Fifty-fourth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1934, p. 557.

[22] Report of the Proceedings of the Fifty-fifth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1935, p. 832.

[23] Resolution No. 83 in Report of the Proceedings of the Fifty-ninth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1939, pp. 492, 505.

> they have led the workers into strikes and industrial conflict, not for the legitimate purpose of bettering conditions, improving wages or hours, or defending the workers from attack, but for the radical purpose of developing class conflict, and for the purpose of creating situations which they could use for the spread of Communist propaganda;
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> * * * * *
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> These Communist leaders in their efforts to promote class warfare, and ignoring the legitimate purpose of labor unions and the legitimate interests of the workers, have disrupted unions, divided the workers into warring camps, crippled industrial production, and caused loss of jobs and wages to the mass of the workers * * *.

Impressive in this regard also, is the experience of Joseph Curran, president of the National Maritime Union (C. I. O.). Writing in the "Pilot," official newspaper of the N. M. U., President Curran recounted the efforts of Communists within the union during the period of hostilities between Germany and Russia, to force upon the union a policy of collaboration with employers and total abandonment of strikes, whatever the cost of such a policy to the economic interests of the union members. He pointed out, however, that since the end of the war, shortly after relations between the United States and Russia began to deteriorate, the Communists did their utmost to preclude the establishment of amicable relations and to provoke hostility between employers in the industry and the union. On both occasions, Curran pointed out, the policy advocated by the Communists in the union was "the policy of the Communist Party."[24] In the columns of the "Pilot" for October 10, 1947, Curran exposed the efforts of the Communists in the N. M. U. to gain control of the union convention. He said in part: "Any rank and filers who thought that this was a simple fight between officials for power can now see by the action of the Communists at this convention that it is not. It is a fight by the Communists to either control our

[24] N. M. U. "Pilot," September 12, 1947, page 2, cols. 3–4.

Union or destroy it. Nothing less." [25] President Curran repeated this observation on October 24, 1947, in a column in which he also said: "They [Communist delegates] came to the convention fully instructed and with a program directed by the highest chiefs in the Communist Party * * *. These party delegates [who voted contrary to the instructions of their union constituencies] proved beyond a shadow of a doubt that they represented NOT the membership of the N. M. U., but belonged body and soul to the Communist Party." [26] In a column appearing on November 7, 1947, Curran pointed out that by virtue of Communist control, "Instead of laying stress on the needs for jobs for our members and internal problems of our Union, the greatest space in the "Pilot" is devoted to the material that the Communist Party is pushing." [27] On November 21, 1947, Curran disclosed in his column that Communist leaders within the union, after their defeat in the convention, had undertaken to destroy the union, by promoting unnecessary strikes and by refusing to settle grievances amicably with employers.[28]

In an article appearing in the New York Times on May 11, 1947, David Dubinsky, President of the International Ladies Garment Workers Union (A. F. of L.), recounted the experience of that union in 1926, when, for a short period, the New York locals of that organization were subject to Communist leadership. These leaders, he stated,[29] "succeeded in plunging the coat and suit industry into a general strike. After a futile eight-week struggle the local Communist leaders had had enough. They were ready to come to a settlement, but the Communist Party, feeling that the Moscow line was about to change, ordered their agents inside the union to continue the strike—against their better judgment and against the interest of the workers. * * * It took ten years for us to recover from the criminal and stupid Communist-led strike of 1926 which cost $3,500,000 and left in its wake a chaotic industry and a crippled union." In the same article he explained[30]

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[25] "Pilot," page 2, cols. 2–3.

[26] "Pilot," October 24, 1947, p. 2, col. 2.

[27] "Pilot," p. 2, col. 2.

[28] "Pilot," p. 2, cols. 2–3; p. 9, col. 4.

[29] Part VI, p. 11.

[30] *Ibid.*, p. 7.

> The workers organizations are the largest and most vital nongovernmental body in the community. They are primarily dedicated to improving working conditions, to raising living standards. They are part of a delicate mechanism of modern life, the core of "human engineering." The influence of organized labor reaches far beyond its 13,000,000 members or their families.
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> For this reason the significance of Communist operations in trade unions can scarcely be exaggerated. Like termites, they bore into the "house of labor," but are not an integral part of the structure because the spirit and aims of totalitarian communism are totally distinct from and hostile to the ideals and policies of trade-unionism.

In February 1945, while the Retail, Wholesale and Warehouse Employees Union (C. I. O.), was engaged in a strike provoked by the recalcitrant refusal of Montgomery Ward & Co. to bargain collectively with that Union, or to accede to directives of the National War Labor Board, locals of that Union, which were under Communist leadership, castigated the leadership of the national union severely for having undertaken the strike. The official union publication that month carried an article demonstrating that these attacks upon the national leadership of the union were a betrayal of the Union's interests, and were dictated only by adherence to the Communist Party "line" which, during that period, denounced all strikes, and completely subordinated all legitimate trade-union interests to the need for continued production while the United States and Russia were allies in the war.[31]

Spokesmen for the Communist Party, former Communist party officials, and students in the field of labor relations agree that Communist leaders of labor organizations utilize trade-unions not primarily as instruments for advancing the economic welfare of workers through the process of collective bargaining, but rather as weapons of class warfare for the

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[31] The Retail, Wholesale, and Department Store Employee, February 1945, pp. 5, 14.

advancement of political objectives.[32] In his book, *I Confess,* Benjamin Gitlow, formerly a prominent Communist, stated as follows:

> In the Communist movement, *control* is a factor of the greatest importance. Every Communist, no matter in what organization he belongs, has it continually hammered into his head that the objective of a Communist must be to gain control. As soon as Communists gain control of a union, a strike, or any kind of activity, the Party steps in and runs the union, leads the strike, and directs the activity.

In the face of this evidence Congress could and did reasonably conclude, as the Seventh Circuit held in the *United Steelworkers* case and the District Courts held in the *N. M. U. Warehouse Workers cases,* that extension of the benefits and protection accorded in the Act to labor organizations led by Communists and their supporters would not tend to effectuate the policies of the Act; that such organizations might utilize the powers accorded exclusive bargaining representatives by the Act to foment strikes and discord rather than to promote the economic welfare of union members, and amicably to settle disputes; and that to vest additional power in the hands of such organizations might constitute a danger to national security. "The reasonableness of that conclusion," as emphasized by the Seventh Circuit in the *Inland Steel* case, "was for Congress to determine" (170 F. 2d at 266), citing *North American Co.* v. *S. E. C.*, 327 U. S. 686, 700.

It cannot, we believe, be denied that Congress has the power to withhold benefits which it confers for the accomplishment of legitimate purposes within its constitutional powers from those who, it has cause to believe, may utilize those benefits for dif-

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[32] See, *e. g.*, Foster, *From Bryan to Stalin* (International Publishers Co., 1937); particularly pp. 153, 154, 162–163, 213–215, 272–273, 275, 276, 277, 298–299; Saposs, *Left Wing Unionism* (International Publishers Co., 1926), p. 64: "In the relations of the unions with employees and the government 'class struggle' tactics are counselled as against 'class collaboration' tactics"; Foster, *Toward Soviet America* (Coward-McCann, Inc., 1932), pp. 232–233, 258–259, 266; Gitlow, *I Confess* (E. P. Dutton & Co., Inc., 1940), p. 334–395; O'Neal & Werner, *American Communism* (E. P. Dutton & Co., Inc., 1947), pp. 231–236, 245–246, 312–313.

ferent and antithetical purposes. The privileges and benefits of the Act are conferred upon labor organizations by Congress for the accomplishment of specific public purposes; Congress is under no obligation to extend those privileges and benefits to all organizations blindly, without regard to whether such extension will effectuate the policies which Congress seeks to promote.[33] It is no less a legitimate objective of Congressional power to guard against the danger of misuse of facilities created by Congress for specified purposes than to create such facilities in the first place. The objective of Section 9 (h) being clearly within the power of Congress, we now examine the appropriateness of the means adopted by Congress for its attainment.

D. The means adopted by Congress to assure that the benefits and facilities of the Act shall not be extended to labor organizations whose officers are Communists or supporters of organizations dominated by Communists or to persons who believe in, or support organizations which advocate violent overthrow of the government are appropriate

In selecting means appropriate to effectuate its objective of insuring that the benefits and facilities of the Act not be extended to Communists and their followers who might utilize those benefits and facilities for the accomplishment of objectives which Congress did not desire to promote, Congress took cognizance of the fact that many Communists do not openly acknowledge their affiliation; and that many persons who follow and support the policies and objectives of the Communist

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[33] Because, as Judge Prettyman agreed in his dissenting opinion in the N. M. U. case, *supra*, pp. 182–183, and as the Union apparently concedes in its brief (pp., 42, 73), Congress is clearly empowered to deny the benefits of the Act to labor organizations which it has reason to believe may use those benefits for purposes other than those which Congress specifically desired to protect, and because Congress is not bound by the Constitution to protect all union activities alike, or protect none, the decision of the Supreme Court in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156; the dissenting opinion in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 417, 436, and the decision of the Supreme Court of California in *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 855, upon which the Union relies (Brief, p. 67), are inapposite here. For these cases follow the principle that when governments, under the Constitution, undertake to facilitate the dissemination of information, or to facilitate freedom of assembly, they are empowered only to facilitate the dissemination of views, as such, or assemblies, as such; governments have no power under the Constitution to facilitate only the expression of favored views, or meetings of approved groups. An

Party are not themselves Party members.[34] It was for this reason that Congress in Section 9 (h) provided that each officer of a labor organization seeking to invoke the facilities of the Board must file an affidavit under oath, that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or any illegal or unconstitutional methods.

Absent the requirement that union leaders themselves declare whether they are Communists or affiliated with the Communist Party, and whether they believe in, or support organizations which believe in, the overthrow of the government by violence or illegal means, the objective of Congress to withhold the facilities of the Act from organizations led by Communists or supporters of Communism could not practicably be achieved. An oath, such as that suggested by Judge Prettyman in his dissenting opinion in the *National Maritime Union* case, *supra*, at pp. 180–181, that the "officer of the Union did not advocate the use of the strike for political purposes or merely to prevent strife, and would not, under penalty, so advocate or act," would not serve adequately to guard against such conduct. For such an oath could be taken with complete immunity to prosecution for perjury until after the event; union leaders could become

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attempt to restrict to favored groups or views media which government may constitutionally make available only for the purpose of facilitating the spread of information, must of course, therefore, fall. The constitutional objection present in the cases cited by the Union, but absent here, is best epitomized in the following quotation from James Mill ("Liberty of the Press," Encyclopedia Brittanica, Supp. 6th Ed. 1921—Reference Shelf IV #9, p. 83) :

"Freedom of discussion means the power of presenting all opinions equally, relative to the subject of discussion and of recommending them by any medium of persuasion which the author may think proper to employ. If any obstruction is given to the delivering of one sort of opinions, not given to the delivering of another; if any advantage is attached to the delivery of one sort of opinions, not attached to the delivery of another, so far equality of treatment is destroyed; and so far the freedom of discussion is infringed; so far truth is not left to the support of her own evidence; and so far, if the advantages are attached to the side of error, truth is deprived of her chance of prevailing."

[34] Compare testimony of Louis Budenz before the House Committee, Hearings, 80th Cong., 1st sess., pp. 3604–3605; 3616, 3622–3625; see also, pp. 1425–1426; O'Neal & Werner, *op. cit. supra*, note 41, pp. 331–333, 223–225, 206–207.

entrenched in positions of power from which they could engineer political strikes without risk of penalty until after the evil was perpetrated. The evils which the statutory scheme is designed to prevent could be perpetrated with no recourse open to the government save to punish for the commission of acts which it is the objective of the statute not to punish but to avoid. Section 9 (h), like Section 11 (b) (1) of the Public Utility Holding Company Act, "is not designed to punish past offenders but to remove what Congress considered to be potential if not actual sources of evil. And nothing in the Constitution prevents Congress from acting in time to prevent potential injury to national economy from becoming a reality." *North American Company* v. *Securities & Exchange Commission,* 327 U. S. 686, 710–711. In any event, this method selected by Congress, is clearly appropriate for the purpose of insuring that the facilities of the Act not be extended to the groups which Congress reasonably desired to exclude. And when a choice of appropriate methods is available the choice is for Congress to make.

The scope of the declaration required by Section 9 (h) is likewise appropriate to the objective of identifying the groups from which the evils to be avoided were most to be feared. Congress could properly consider that not only those union leaders who were themselves Communists or affiliated with the Party, but also those leaders who believed in, or supported organizations which believed in, overthrow of the government by violence or illegal means, might tend to utilize their powers as exclusive bargaining representatives for objectives alien to collective bargaining concerning "wages hours or other working conditions." Certainly, as stated by Seventh Circuit in the *Inland Steel* case, *supra* (170 F. 2d at 266), "it was rational for Congress to conclude that [such persons] were more likely than others so to utilize the powers which inhere in union office." Cf. *Bryant* v. *Zimmerman,* 278 U. S. 63, 73, 76–77, discussed at length in the opinion of the District Court in *National Maritime Union* v. *Herzog, supra,* at pp. 146, 169–170; *Clarke* v. *Deckebach,* 274 U. S. 392, 396–397; *Hirabayashi* v. *United States, supra.* Nor was it incumbent upon Congress to find that all persons in the excluded categories would necessarily

misuse the powers of union office. Provided the classification adopted is "not shown to be irrational," and no such showing is even attempted in this case, Congress may exclude "an entire class rather than its objectionable members selected by more empirical methods." *Clarke* v. *Deckebach, supra,* at p. 397.

As the National Labor Relations Board pointed out in its decision in *Matter of Northern Virginia Broadcasters, Inc.,* 75 N. L. R. B. 11, 20 L. R. R. M. 1319, October 7, 1947, the affidavit provisions of Section 9 (h) were intended, in part, to accomplish identification of union leaders to union members as Communists or supporters of Communism on the theory that if the union members were aware of such affiliation by their officers they would oust them from office. It can hardly be doubted that in protecting employee freedom of choice in the self-organizational sphere, Congress would be empowered, even directly, to require those who compete for employee support to disclose matters such as this which employees may consider directly relevant to their choice. By providing employees with an incentive to replace Communist with non-Communist leaders, Congress likewise acted to accomplish an objective well within its powers to avoid interruptions to interstate commerce. For Congress could reasonably conclude, as it did, that political strikes would be less likely to occur and true collective bargaining would best be fostered if labor organizations were headed by non-Communists. Since Congress utilized only means within its power thus to safeguard interstate commerce, the section is immune to attack.

The suggestion (brief, pp. 48–49) that the classification is invalid because employers are not required to file similar affidavits requires little comment. "Congress may hit at a particular danger where it is seen without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States,* 320 U. S. 81, 100. That rational basis exists for distinguishing in legislative treatment between labor organizations, on the one hand, and employers on the other, is established by abundant authority. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 471–472; *United States* v. *Petrillo,* 332 U. S. 1.

E. The condition contained in the Board's order is not unconstitutionally "vague" or "indefinite"

The Union contends in its brief (pp. 25–40) that Section 9 (h) and the Board's order are unconstitutional because the facts which the Union's leaders are required to aver as a condition to obtaining the benefits of the order are "vague" and "indefinite." But the Union does not even assert that none may take the oath with full knowledge that he speaks the truth. The facts are that literally thousands of leaders of labor organizations, since the passage of the Act, have filed the affidavits contemplated by Section 9 (h) without apparent qualm concerning the truth of their assertions. It may be, of course, that in particular instances individuals may doubt whether they can truthfully affirm that they do not "support" an organization which teaches overthrow of the government by illegal means. It can hardly be suggested, however, that Congress is without power to restrict the powers and privileges of the Act to organizations whose officers can and do truthfully so affirm. But, even more important, Section 9 (h) does not bar an individual from compliance merely because he may be in doubt, for example, whether a particular organization which he supports "teaches" overthrow of the government by illegal means. The Union overlooks the fact that the sole penalty provided for filing of false affidavits under Section 9 (h) is prosecution under Section 35A of the Criminal Code. That Section provides criminal penalties for "knowingly and willfully" making fraudulent or fictitious statements to any agency of the Federal Government. Clearly, no affiant could successfully be prosecuted under this Section for filing a false affidavit under Section 9 (h) unless it could be proved that he knowingly lied in making the averments contained in his affidavit. See *U. S.* v. *Gilliland,* 312 U. S. 86. If an affiant honestly believes that he is not affiliated with the Communist Party, and that he does not, as he defines the term, support any organization which to his knowledge teaches the overthrow of government by means which he knows to be illegal or unconstitutional, the affiant stands in no danger of conviction under Section 35A. See *Screws* v. *United States,* 325 U. S. 91, 101–

105. "There is no vagueness or uncertainty in his own personal definition" *N. M. U.* v. *Herzog, supra,* 78 F. Supp. at p. 172.

Moreover, as the Seventh Circuit stated in the *United Steelworkers* case, "the statute is as specific as the nature of the problem permits." Compare 54 Stat. 671, 18 U. S. C. § 10, upheld as against contentions identical to those raised by the Unicn in this case in *Dunne* v. *United States,* 138 F. 2d 137 (C. C. A. 8), certiorari denied, 320 U. S. 790. Under these circumstances, the holding of the *Screws* case *supra,* as reinformed by the recent decision in *United States* v. *Petrillo,* 332 U. S. 1, establishes that the requirement of "wilfulness" which appears in Section 35A as an ingredient of the offense to be proved, preserves the statute from attack on grounds of vagueness or indefiniteness.

In any event, the requirement that a statute not be vague or indefinite applies only where the statute exacts "obedience to a rule or standard" (*Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 243) which either "forbids or requires the doing of an act" (*Connally* v. *General Construction Co.,* 269 U. S. 385, 391). Section 9 (h) does neither. No one is required to execute the affidavits contemplated by that Section. No one is prohibited from engaging in the activities set forth in that Section, or from believing in the doctrines enumerated. The statute requires only that persons who knowingly engage in such activities, or knowingly believe in the enumerated doctrines, or knowingly support organizations which disseminate such doctrines, shall not obtain access to the machinery set up by Congress for the purpose of advancing a specific public policy, and shall not through wilfull misrepresentation attempt to obtain benefits barred to them.

Insofar as the Union's objection on these grounds stems from the allegation that Union leaders who file the affidavits may be subjected to prosecutions under Section 35A, undertaken on the basis of probable cause, it is sufficient answer that the burden of enduring lawsuits is a concomitant of life in a civilized society.

F. Section 9 (h) of the Act is not a bill of attainder

The Union contends (brief, pp. 40–46) that Section 9 (h) is constitutionally objectionable on the ground that it is a bill of attainder. Such a contention could stem only from the misapprehension under which the Union appears to labor (brief, pp. 14–15, 44–45), that the Section imposes "punishment" upon individuals for entertaining unpopular beliefs, or for being associated with unpopular organizations, and upon labor organizations for retaining officers who hold such beliefs, or continue such associations. The very cases cited by the Union demonstrate that the prohibition against bills of attainder is applicable only to laws which impose punishment. As Mr. Justice Frankfurter pointed out, concurring in the *Lovett* case (328 U. S. at 324):

> Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by government authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker* v. *New York,* 170 U. S. 189, or because he is no longer qualified, *Dent* v. *West Virginia*, 129 U. S. 114. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. *Cummings* v. *Missouri,* 4 Wall. 277, 320.

In referring to this quotation in its opinion in the *N. M. U.* case, the District Court did not, as the Union asserts in its brief, "prefer Mr. Justice Frankfurter's opinion to that of the majority" (p. 38). The crucial difference between the majority of the Court and the concurring Justice in the *Lovett* case lay not in a dispute over the validity of the doctrine of the *Cummings* case that "the deprivation of any rights * * *

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previously enjoyed *may* be punishment" [italics added], but rather in differing views as to whether "the circumstances attending and the causes of the deprivation" of office in the *Lovett* case gave rise to a permissible inference that the deprivation was punitive, rather than intended to prevent a future evil. The majority of the Court inferred that the denial was punitive because no circumstances were shown which indicated that the measure was intended to be cautionary of future evils. Mr. Justice Frankfurter was unwilling so to find in the absence of positive evidence that punishment for past conduct or present beliefs was the actual motive for the deprivation.

The reason for the action of Congress in denying to Communists and to their supporters the benefits of resort to the Board, as we have demonstrated above, was not punitive. Disqualification is a preventive measure, intended to guard against the evil of misuse of power to provoke political strikes, an evil against which Congress may constitutionally guard. As stated by the Court in the *Inland Steel* case, *supra,* "Section 9 (h) does not rest upon any finding of guilt, but like the disqualification of convicted felons from medical practice in *Hawker* v. *New York* [170 U. S. 189] and the disqualification of aliens from operating pool halls in *Clarke* v. *Deckebach* [274, U. S. 392, 396–397] it operates not to impose punishment but to safeguard important public interests against potential evil" (170 F. 2d at 267). Because it is a preventive and not a punitive measure Congress did not, and was not required to find as a condition to enactment of Section 9 (h), that all Communists, or all believers in the overflow of the government by illegal means had misused the benefits of the Act to promote activities which Congress did not desire to support, just as in the cited cases the legislatures had not found that all convicted felons had engaged in immoral practices in connection with the practice of medicine, or that all aliens had created public nuisances when permitted to operate pool halls.

Since Section 9 (h) does not rest upon any finding of "guilt," the Union's charge that the Section legislates "guilt by association" must clearly fail. Congress, in Section 9 (h), ad-

dressed itself generally to the evil which it believed to exist, the danger that if access to the benefits of the Act were accorded to unions led by Communists and their supporters, some such unions might tend to hinder and frustrate effectuation of the policies of the Act. In the light of that danger, Congress was empowered to legislate as it did "unlimited by proof of the existence of the evils in each particular situation." *North American Company* case, *supra.*

G. The condition contained in the Board's order does not encroach upon freedom of thought or freedom of political affiliation

Adoption by Congress of the policy evidenced by Section 9 (h) of the Act, as embodied in the condition contained in the Board's order, is not, contrary to the Union's assertion, an attempt to prescribe what shall be orthodox in politics or economics. That policy is concerned not with belief, as such, nor with political affiliation, as such, but with the tendency of individuals, by virtue of their beliefs and affiliations, to utilize powers and privileges conferred by Congress for purposes other than those for which the powers and privileges were created. Beliefs and affiliations are thus not the targets of the statute. The target is potential conduct which Congress is authorized to exclude from the area of activities protected by the law. Belief and affiliation, it is true, are utilized as the basis for describing the class from whom such potential conduct may be expected. But, as we have shown above, it is the possession of the very beliefs and affiliations named in Section 9 (h) which leads individuals to engage in the conduct which Congress did not desire to protect. Under such circumstances the Constitution does not inhibit the use of belief and affiliation as a basis for distinction between those from whom particular conduct may be expected and those from whom it may not.

What plaintiffs' position really amounts to is that no matter how clearly it may be established that persons who subscribe to particular beliefs will tend, by virtue of those beliefs, to utilize the power and benefits conferred by Congress for purposes other that those sheltered by Congress, Congress is powerless to make possession of such belief a basis for distinction between

those to whom the powers and benefits should be granted and those from whom they should be withheld. But freedom from discriminatory treatment because of political belief and affiliation is guaranteed no more and no less stringently under the Constitution than is freedom from discriminatory treatment on the ground of race (*Takahashi* v. *Fish & Game Commission,* 334 U. S. 410; *Sipuel* v. *Board of Regents,* 332 U. S. 631); or of alienage (*Takahashi* case, *supra; Truax* v. *Raich,* 239 U. S. 33); or of consanguinity, or prior conviction of a felony, or political activity, or belief in pacifism or in anarchy. The facts that particular individuals are members of a particular race, or are aliens, or are related to a particular class of persons, or believe in pacifism or in anarchy do not normally give rise to inferences concerning future conduct by them of a type which is relevant to the usual subjects of legislation. Yet, this is not always true, as the cases cited above, pp. 17–20 *supra,* abundantly attest. The fact that an individual is an alien may give rise to a legitimate inference that he may operate a pool hall less circumspectly than a citizen (*Clarke* v. *Deckebach, supra*); that an individual has been convicted of a felony may give rise to a legitimate inference that he may be less trustworthy a doctor than one who has never been convicted (*Hawker* v. *New York, supra*); that a citizen is Japanese may give rise to a legitimate inference that he is more likely to give aid and comfort to an enemy Japan, than citizens of other extractions (*Hirabayashi* case, *supra*); that a person believes in anarchy may give rise to a legitimate inference that he will be a less desirable resident of the United States than persons who do not entertain this belief (*Turner* v. *Williams, supra*); that a person engages in political activity may give rise to an inference that he is a less desirable public servant than one who does not engage in such activity (*United Public Workers* v. *Mitchell, supra*); that an individual is a relative or friend of a licensed pilot may give rise to a legitimate inference that he may become a more competent pilot than others (*Kotch* case, *supra*); that an individual believes in pacifism may give rise to a legitimate inference that he may prove less worthy a member of the bar and a servant of the court, than those who do not entertain that belief (*Summers* case, *supra*).

The fact that an individual is a member or supporter of the Communist Party, or believes in violent overthrow of the government, likewise, may give rise to a legitimate inference concerning future conduct within the orbit of legitimate legislative concern. In *United States* v. *Schneider,* 45 F. Supp. 848, 850 (E. D. Wis.), District Judge Duffy held unconstitutional a statutory provision denying work relief to Communists on the ground that "There is no necessary connection between the political or social beliefs of a person and his distress." But where, as here, there is a "necessary connection" between membership in or support of the Communist Party, or belief in violent overthrow of government, and the uses to which the powers of union office may be put, Congress is not precluded by the Constitution from utilizing those facts as a basis for classification. Freedom of political belief or affiliation does not include the right to preclude Congress from taking cognizance of tendencies to conduct which may stem from the possession of particular beliefs or affiliations. The doctrine of freedom of belief and affiliation may not be used to blind legislatures to facts of common knowledge, or to preclude legislatures from properly exercising their constitutional power in the public interest.

The basic fallacy upon which the Union's argument rests is the assumption that Congress offered incentives to employees to rid themselves of Communist leadership solely because Congress does not approve of Communist views (Br. pp. 14–17). Once it appears, however, that "the Act was not passed because Congress disapproved of the views and beliefs of [the excluded group], but because Congress recognized that persons who entertained [those] views * * * might not utilize the powers and benefits conferred by the Act for the purposes intended by Congress" *Inland Steel* case, *supra* 170 F. 2d at 264, the base of the argument falls. Where rational basis exists to support legislation, prejudice may not be imputed to Congress as an excuse for its invalidation. *South Carolina State Highway Department* v. *Barnwell Bros., Inc.,* 303 U. S. 177, 191; *Railroad Retirement Board* v. *Alton Ry. Co.*, 295 U. S. 330; *Hirabayashi* v. *United States,* 320 U. S. 81; *U. S.* v. *Carolene Products Co.,* 304 U. S. 144; *Carolene Products Co.* v. *United States,* 323 U. S. 18.

H. The wisdom of the legislation is not a matter for judicial review

Throughout the Union's brief, there appears the suggestion that Section 9 (h) is invalid because it does not in fact aid in promoting collective bargaining, but rather promotes industrial strife, and that it does not protect employees in their full freedom of choice of bargaining agents. Anyone following labor developments in the newspapers cannot be blind to the fact that the provision played a vital role in helping some of the most important unions in the C. I. O., like the United Automobile Workers, the National Maritime Union, etc., free themselves of Communist control, a result which the C. I. O., and particularly Philip Murray, one of the petitioners herein, has openly welcomed. But for purposes of whether it was in the power of Congress to enact the provision, it is as immaterial that the provision has largely accomplished its purpose as it would have been if it had not. For these considerations are for the legislature exclusively and not for the courts. It requires no citation of authority to establish that whether legislation be deemed wise or unwise, desirable or undesirable, well or ill calculated to accomplish the ultimate legislative end in view, is not the test of its validity. Within constitutional boundaries, it is for the legislature alone to determine the purposes for which it shall create public rights and the manner of their effectuation.

CONCLUSION

For the reasons stated it is respectfully submitted that Section 9 (h) of the Act is constitutional, and the condition of the order is valid, and, subject to the condition, the order should be enforced in full.

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